DATO' SAMSUDIN ABU HASSAN

v.

ROBERT KOKSHOORN

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-387-02]
28 MAY 2003

ARBITRATION: *Arbitrator - Interlocutory decision by arbitrator - Whether an award - Whether only mere ruling - Whether not within ambit of s. 23 of Arbitration Act - Whether not subject to review by court - Arbitration Act 1952, ss. 23(1), 24(1) & (2) - Rules of High Court 1980, O. 69 r. 2(1)*

The arbitrator in this case had decided, in the course of an arbitration proceeding, to exclude certain documents from the evidence for reason that the documents were caught by the "without prejudice" rule. Dissatisfied with the decision, the respondent applied to the High Court for, and obtained an order that the 'award' be remitted to the arbitrator for reconsideration pursuant to s. 23(1) of the Arbitration Act 1952 ('the Act'). In this appeal against the said order of the High Court, a question *inter alia* arose as to whether the said decision of the arbitrator was in law an 'award', making it perfectly proper for the High Court to have invoked the said s. 23(1), or a mere interlocutory 'ruling' over which the court had no power to supervise or review by way of an application such as made to the High Court by the respondent herein.

Held:
Per Abdul Hamid Mohamad JCA

[1] Section 23(1) of the Act envisages the consideration by the court of a matter dealt with in an award. It follows that, with the exception of an application to remove an arbitrator pursuant to s. 24 of the Act, the court has no power to supervise arbitration or review interlocutory decisions of an arbitrator or order that the arbitrator should reconsider a pre-award ruling. (p 8 d-e)

[2] The decision made by the arbitrator is not an award or interim award. It is merely a ruling on the admissibility of documents. Clearly, therefore, the matter being referred to court herein is not the kind of "matter" envisaged by s. 23(1) of the Act. (pp 6 g & 9 d-e)

[3] Even in a normal trial in courts of law, such a ruling as made by the arbitrator is not appealable. Further, to allow every such ruling to be remitted back to the arbitrator under s. 23(1) of the Act, or be challenged in court, would defeat the main purpose of arbitration and borders on an abuse of the process of court. In the circumstances, the respondent ought to have waited until the end of the arbitration proceeding and when the award is handed down, challenge the award and hence the ruling. (p 9 d-f)

[Appeal allowed; arbitrator to proceed with arbitration on basis of ruling.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Penimbangtara dalam kes ini, semasa suatu prosiding timbangtara, telah memutuskan untuk menolak beberapa dokumen sebagai keterangan atas alasan bahawa kaedah "tanpa prejudis" terpakai kepada dokumen-dokumen tersebut. Merasa tidak puas hati dengan keputusan, responden memohon kepada Mahkamah Tinggi dan memperoleh perintah supaya 'award' tersebut dikembalikan kepada penimbangtara untuk pertimbangan semula di bawah s. 23(1) Akta Timbangtara 1952 ('Akta'). Dalam rayuan semasa terhadap perintah Mahkamah Tinggi tersebut, persoalan antara lain telah berbangkit berhubung sama ada keputusan yang dibuat oleh penimbangtara merupakan suatu 'award' di sisi undang-undang yang bererti ianya terbuka kepada Mahkamah Tinggi untuk menggunapakai s. 23(1), atau hanya sekadar suatu 'keputusan' interlokutori terhadap mana mahkamah tiada kuasa untuk menyelia atau menyemak melalui permohonan seperti yang dibuat oleh responden kepada Mahkamah Tinggi di sini.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Seksyen 23(1) Akta membayangkan pertimbangan oleh mahkamah akan halperkara yang disentuh dalam sesuatu award. Ianya mengikut bahawa, terkecuali kepada permohonan untuk menolak penimbangtara di bawah s. 24 Akta, mahkamah tidak mempunyai kuasa untuk menyelia mana-mana timbangtara atau menyemak keputusan-keputusan interlokutori penimbangtara ataupun memerintahkan supaya penimbangtara menimbang semula keputusan pra-awardnya.

[2] Keputusan yang dibuat oleh penimbangtara bukan merupakan suatu award atau award sementara. Ianya hanyalah suatu 'ruling' berkaitan kebolehterimaan dokumen. Jelas bahawa perkara yang dirujuk ke mahkamah di sini bukan merupakan "perkara" yang dibayangkan oleh s. 23(1) Akta.

[3] Keputusan seperti yang dibuat oleh penimbangtara tidak boleh dirayu, jikapun ia berbangkit dalam perbicaraan biasa di mahkamah-mahkamah undang-undang. Selain itu, membenarkan setiap keputusan sebegini dikembalikan kepada penimbangtara di bawah s. 23(1) Akta, ataupun dicabar di mahkamah, akan mensia-siakan tujuan sebenar timbangtara dan hampir kepada menyalahguna proses mahkamah. Dalam halkeadaan yang wujud, responden sepatutnya menunggu sehingga akhir prosiding timbangtara dan bilamana award diberikan, mencabar award dan seterusnya 'ruling' berkenaan.

Rayuan dibenarkan; timbangtara diteruskan berasaskan 'ruling' penimbangtara]

Case(s) referred to:

AC Ho Sdn Bhd v. Ng Kee Seng [1998] 2 CLJ 645 CA ***(refd)***

Chiam Tan Tze & Anor v. The Sarawak Land Consolidation and Rehabilitation Authority And Another Case [1994] 3 CLJ 605 ***(refd)***

Exormisis Shipping SA v. Oonsoo, The Democratic Peoples Republic of Korea and the Korean Transportation Corporation [1975] 1 LLR 432 ***(foll)***

Fletamentos Maritimos SA v. Effjohn International BV (No 2) [1997] 2 LLR 302 ***(foll)***

Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd [2003] 1 CLJ 103 CA ***(refd)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd [1998] 3 CLJ Supp 366 HC ***(refd)***

King & Arthur v. Thomas McKenna Ltd & Anor [1991] 2 QB 480 ***(foll)***

MCIS Insurance Bhd v. Associated Cover Sdn Bhd [2001] 2 MLJ 561 HC ***(refd)***

Ong Guan Teck & Ors v. Hijjas Kasturi [1982] CLJ (Rep) 31; [1982] CLJ (Rep) 616 HC ***(refd)***

Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Three Valleys Water Committee v. Binnie & Partners CA Firm [1990] 52 BLR 42 ***(foll)***

Legislation referred to:

Arbitration Act 1952, ss. 23(1), 24(1), (2)

Rules of the High Court 1980, O. 69 r. 2(1)

Arbitration Act 1950 [UK], s. 22(1)

For the plaintiff - Dominic J Puthucheary (Firoz Hussein & Cheng Mai); M/s Puthucheary Firoz Asmet & Mai

For the respondent - Tommy Thomas (Alan A Gomez); M/s Tommy Thomas

Reported by WA Sharif

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant and the respondent entered into an agreement dated 17 May 1996. Under the agreement, the appellant lent the respondent moneys to participate in the equity of a joint venture company established by the parties. The respondent defaulted under the agreement by failing to make payment as stipulated by the terms of the agreement.

Subsequently, Datuk George Seah was appointed by both parties to arbitrate in the dispute between the parties. During the course of the arbitration hearing, the respondent sought to admit, *inter alia*, evidence which comprised of correspondence between the parties. The appellant objected to the admissibility of the said documents on the basis that they fell within the "without prejudice" rule.

After hearing arguments of learned counsel for the parties, the learned arbitrator ruled, on 24 September 2001, that the documents in question fell within the "without prejudice" rule and were therefore inadmissible.

The respondent applied to the High Court for the following orders:

1. An Order that the award ("the said award") handed down by the Sole Arbitrator, Datuk George Seah ("the Arbitrator") on 24th September 2001 be set aside under Section 24(2) of the Arbitration Act, 1952 ("the Act");
2. In the alternative, an Order that the said award be remitted to the Arbitrator for his reconsideration pursuant to Section 23(1) of the Act;
3. In the further alternative, an Order under Section 24(1) of the Act that the Arbitrator, having misconducted himself in handing down the said Award, be removed;
4. Further or other Directions whether under the Act or otherwise; and
5. Costs.

By an order dated 30 April 2002, the High Court ordered the decision to be remitted to the arbitrator for reconsideration pursuant to s. 23(1) of the Act.

The appellant appealed to this court.

The first question to be decided is whether the decision of the arbitrator dated 24 September 2001 whereby he ruled that the documents in question were inadmissible because they fell within the "without prejudice" rule is an "award".

First, it must be stated that the objection to the admissibility of the documents in question was raised "during the submissions on the preliminary issue". It was at that stage, after hearing submission of learned counsel for both parties (by way of written submissions), that the decision to exclude the documents was made.

Section 23(1) of the Act provides:

23. Power to remit award

(1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the consideration of the arbitrator or the umpire.

Section 24(1) and (2) provides:

24. Removal of arbitrator and setting aside of award

(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

The word "award" is not defined in the Act. The Act however does talk about "interim award" (s. 15) which is also not defined.

Reading s. 23 there appears to be some ambiguity whether that section refers only to remission of "awards" and nothing else. The heading (or the marginal note, as it used to be called) is "power to remit award". But sub-s. (1) says "… the High Court may from time to time remit the matters referred, or any of them, to the consideration of the arbitrator ..."

This is then followed by the words "Where an award is remitted ..." in subsection (2). "Matters" mentioned in subsection (1) appears to be wider than "award" mentioned in subsection (2). In other words, where the **matter** referred is an award and the award is remitted by the High Court to the arbitrator, then sub-s. (2) applies.

Under s. 24, an arbitrator may be removed before he hands down an award, or after he has handed down the award. In the latter case, the award may be set aside.

Order 69 r. 2(1) of the Rules of the High Court 1980, under which this application was made to the High Court provides:

(1) Every application to the Court:

(a) to remit an award under section 23 of the Act; or

(b) to remove an arbitrator or umpire under section 24(1) of that Act; or

(c) to set aside an award under section 24(2) thereof must be made by originating motion to a single Judge in Court.

Thus we see that the RHC 1980 refers to an application under s. 23 of the Act as an application to remit an award which seems to support the contention of learned counsel for the Appellant that only an award may be remitted under s. 23. But, that seems to go against the wording of s. 23 itself when it uses the word "matters".

We shall now turn to case law.

Based on the research done by learned counsel for both parties, there does not appear to be a single case in this country where a ruling made in the course of an arbitration had been referred to court and remitted back to the arbitrator. The cases are on "awards" and "interim awards".

Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 was an application to set aside an award. *Ong Guan Teck & Ors v. Hijjas bin Kasturi* [1982] CLJ 31; [1982] CLJ Rep. 616 was an application for the extension of the period of six weeks limited by O. 69(4), (1) of the RHC 1980 to make an application to remit an award under s. 23 of the Act. *Jeuro Development Sdn. Bhd. v. Teo Teck Huat (M) Sdn. Bhd.* [1998] 3 CLJ Supp. 366 was an application to set aside two awards, one on liability and one on damages. *A.C. Ho Sdn. Bhd. v. Ng Kee Seng* [1998] 2 CLJ 645 (CA) was also an application to set aside an award. So are *Hartela Contractors Ltd. v. Hartecon JV Sdn. Bhd. & Anor* [1999] 2 CLJ 788 (CA), *Future Heritage Sdn. Bhd. v. Intellek Timur Sdn. Bhd.* [2003] 1 CLJ 103 (CA), *Chiam Tan Tze & Anor v. The Sarawak Land Consolidation and Rehabilitation Authority and Another Case* [1994] 3 CLJ 605. *M.C.I.S. Insurance Bhd. v. Associated Cover Sdn. Bhd.* [2001] 2 MLJ 561 concerned an "interim award" on liability made and published by the arbitrator.

In these cases the meaning of "award" and "interim award" was discussed. We do think we have to repeat them or discuss them further. In our view, the decision made by the arbitrator in this case is clearly not an award or interim award. It is merely a ruling on the admissibility of documents.

What these cases show is that all applications made to court under s. 23 are in respect of awards or interim awards. In none of these cases was there an application made to challenge a ruling made in the course of the arbitration to exclude certain documents.

The English case of *Exormisis Shipping S.A. v. Oonsoo, The Democratic Peoples Republic of Korea and the Korean Transportation Corporation* [1975] 1 LLR 432 offers an interesting illustration. Section 22 of the (English)

Arbitration Act 1950 is in *pari materia* with the Malaysian s. 23. In the course of the arbitration proceedings, the charterers applied to the umpire for an order giving them leave to amend their defence and counterclaim and to fix further hearing at which they would be entitled to be present and put forward their case. The umpire refused and the charterers applied to the court for an order compelling the umpire to rehear the case contending that the court had, under s. 22(1) of the (English) Arbitration Act 1950, unfettered discretion to remit matters referred at any time for reconsideration by arbitrators. The application was dismissed. Donaldson J held:

(1) the only power of the Court to intervene in an arbitration was the statutory power contained in the Arbitration Act, 1950 (see p. 434. col. 1); and there was no inherent power in the High Court to supervise arbitrators (see p. 434, col. 1);

(2) it was entirely a matter for Parliament to decide whether or not the High Court should have general supervisory jurisdiction (see p. 434, col.2); and the Court had no jurisdiction to accede to the application (see p. 434, col. 2).

In *Three Valleys Water Committee v. Binnie & Partners C.A Firm* [1990] 52 BLR 42, one of the issues was whether the arbitrator's decision refusing leave to serve pleadings out of time was a procedural mishap and whether the court could intervene. It was held by Steyn J:

(7) Moreover, section 22 envisaged the reconsideration of a matter dealt with in an award and there was therefore no power for the court to order that an arbitrator should reconsider a pre-award ruling …

The decision of the Court of Appeal in England in *Fletamentos Maritimos S.A. v. Effjohn International B.V. (No. 2)* [1997] 2 LLR 302 makes the position very clear. Briefly in that case, the arbitrator refused an application for discovery. Waller LJ, at p. 306 said:

I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. The power which it does have come from the Arbitration Acts. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under s. 22 applies to awards. (See Mr. Justice Donaldson (as he then was) in *Exormisis Shipping S.A. v. Oonsoo* [1975] 1 Lloyd's Rep. 432; *Three Valleys Water Committee v. Bunnie* [1990] 52 BLR 47, a decision of Mr. Justice Steyn (as he then was); and Lord Donaldson, M.R. in *King v. Thomas Mc Kenna Ltd.*

[1991] 2 QB 480 at p. 490B-C). In so far as the Judge relied on s. 22(1) (which speaks of matters rather than awards) as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well established authorities.

The judgment of Donaldson LJ in the (English) Court of Appeal case of *King & Arthur v. Thomas McKenna Ltd. & Another* [1991] 2 QB 480 makes it even clearer. His Lordship, said at p. 490:

> Another distinction which has to be borne in mind is that in litigation there is a right of interlocutory appeal at every stage, subject only to restrictions as to time and the need to obtain leave. By contrast in arbitration, subject to certain exceptions such as the power to remove an arbitrator for bias, any intervention by the court can only occur after the award has been made.

We accept the views expressed in the English cases mentioned above which, perhaps, may be summarised as follows:

(a) the court has no power to supervise arbitration and to review interlocutory decisions of an arbitrator;

(b) section 22(1) (Malaysian s. 23(1)) envisages the consideration by the court of a matter dealt with in an award;

(c) the court has no power to order that the arbitrator should reconsider a pre-award ruling;

(d) An exception is an application to remove an arbitrator (Malaysian s. 24).

Coming back to the present case. The decision that is being challenged is the ruling of the arbitrator excluding certain documents. It is clearly not an award or an interim award. Following the views taken by the English courts on a similar provision of the law, the matter being referred to court in this case is clearly not envisaged by s. 23 of the Act. Furthermore, to allow such a ruling to be referred to court and remitted back to the arbitrator under s. 23 of the Act would slow down arbitration proceedings and defeat the whole purpose of arbitration. In an arbitration proceeding, as in a trial, an arbitrator or a judge would have to make numerous rulings along the way regarding admissibility of evidence, documentary or otherwise, whether a question may be allowed to be asked or not and so on. To allow every such ruling to be referred to court and remitted back to the arbitrator would seriously delay the proceedings before the arbitrator, what more, as in this case, where the decision of the High Court is appealed further and where there are a number of such applications and further appeals. It would also increase costs.

The purpose of arbitration is to settle a dispute outside court, to save time and costs and also to enable a more flexible procedure to be followed, unlike in a court of law. It is meant to take the dispute out of the normal process of court. That is why there is no right of appeal from a decision, order or judgment of an arbitrator. That is why the law provides that only in specific matters that applications may be made to court in respect of an arbitration proceeding. That is why the grounds on which the court may interfere with an award of an arbitrator are very limited – see for example *Hartella Contractors Ltd v. Hartecon JV Sdn. Bhd. & Anor* [1999] 2 CLJ 788 (CA) and *Future Heritage Sdn. Bhd. v. Intelek Timur Sdn. Bhd* [2003] 1 CLJ 103 (CA).

In this case, the decision of the arbitrator being challenged is merely a ruling that certain documents are not admissible. Even in a normal trial in courts of law, such rulings are not appealable. A party has to wait until the end of the case, appeal against the final judgment, decision or order and when arguing the appeal, argue on the correctness or otherwise of all those rulings. To allow every ruling of an arbitrator in the course of the arbitration proceeding to be challenged in court would defeat the main purpose of arbitration and borders on an abuse of the process of the court. In any event, we are of the view that that is not the kind of "matter" envisaged by s. 23 of the Act. The respondent should have waited until the end of the arbitration proceeding and when the award is handed down, challenge the award and in so doing challenge the ruling.

In light of the view that we have taken, it would not be proper for us to decide whether the ruling of the arbitrator excluding those documents is right or wrong at this stage. We leave the issue open so that the respondent may challenge it if and when he decides to challenge the award when made.

In the circumstances, we allow this appeal with costs and direct the arbitrator to proceed with the arbitration on the basis of his ruling regarding the admissibility of the documents in question.

We do not think it is necessary for us to discuss prayer (c) (removal of the arbitrator under s. 24(1) of the Act). The learned judge did not make such an order nor did the parties argue that prayer before us. We take it that the prayer has been abandoned. Indeed it is irrelevant in view of the order made by the learned judge and by us in this appeal.